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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK  
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MITSUI SUMITOMO INSURANCE CO. LTD.

Plaintiff,

- against -

EVERGREEN MARINE CORPORATION;  
UNION PACIFIC RAILROAD COMPANY;

Defendants.  
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: 07 Civ. 3874 (CM)

: **DECLARATION OF**  
: **DAVID CLIFTON**  
: **IN SUPPORT OF PLAINTIFF'S**  
: **MOTION FOR PARTIAL**  
: **SUMMARY JUDGMENT**

:

I, David Clifton, declare as follows:

1. I am employed as Vice President of Asmo North Carolina, Inc. ("Asmo NC") and have been so employed since March 19, 1990. I respectfully submit this declaration in support of plaintiff's motion for partial summary judgment.

2. Asmo NC was in 2006, and is at present, in the business of the manufacture, importation and distribution of motorized automotive components. As Vice President of Asmo NC I have overall managerial responsibility for matters relating to the importation and distribution of automotive parts purchased by Asmo NC, including claims for damage to such shipments during transportation.

3. I am familiar with the shipment which is the subject of this action and the documents received and maintained by Asmo NC concerning the shipment and claim.

4. In early 2006 Asmo North Carolina, Inc. (“Asmo NC”) purchased from Asmo Co. Ltd. of Shizuoka Pref., Japan. a shipment of motors and motor parts (the “Shipment”) intended for use in the manufacture of new passenger vehicles. The Shipment included motors and parts for power-window and power-braking systems.

5. Annexed hereto as **Exhibit 1** is a copy of Asmo Co., Ltd. invoice XBC90391 for the Shipment in the FOB Japan amount of \$455,464.56.

6. Annexed hereto as **Exhibit 2** is a copy of the Asmo Co., Ltd. packing list for the Shipment with attached pages which itemize the contents of the 165 cartons of motors and parts which made up the Shipment.

7. As confirmed by the Asmo NC Payment Reference for September 26, 2006, copy annexed hereto as **Exhibit 3**, the full FOB purchase price of \$455,464.56 was paid by Asmo NC to Asmo Co. Ltd.

8. Evergreen Marine Corporation (“Evergreen”) was hired to provide the transportation for the shipment from Japan to Asmo NC in Statesville, NC. The freight charges for the transport were paid by Asmo, NC who, as FOB purchaser, had risk of loss and title to the shipment during transport.

9. Annexed hereto as **Exhibit 4** is a copy of the face side of Evergreen Marine Corporation Sea Waybill EISU025643005523 for the Shipment.

10. In early April 2006 Asmo NC was informed that the Shipment sustained damage due to a derailment in Arkansas. Although the Evergreen bill of lading shows that the Shipment was to be transported in containers TRIU5559381 and UGMU8062288, when the damaged items were delivered to Asmo NC they were carried in different Evergreen containers. After investigations conducted by Asmo NC’s quality

control personnel, and by a surveyor appointed on behalf of Asmo NC's cargo insurer, plaintiff Mitsui Sumitomo Insurance Co. ("Mitsui"), it was determined that the majority of the Shipment could not be used for intended automotive manufacturing purposes and that certain missing items were presumably lost at the derailment site.

11. As a result of the derailment, Asmo NC suffered a loss in the amount of \$382,415.06 based on the invoice value of the damaged and missing items. In addition, Asmo NC incurred incidental expenses, including fees for storage, segregation, and X-Ray inspections, in the amount of \$3,650.64.

12. Asmo-NC presented an insurance claim to Mitsui, who insured the Shipment during transport, for the cargo damage and loss caused by the derailment. The insurance claim of Asmo was paid by Mitsui in the amount of \$422,129.33 based on the invoice value plus the insurance policy advance, the incidental expenses incurred, less the salvage proceeds of \$10,777.20 which were deducted from the claim amount.

13. Annexed hereto as **Exhibit 5** is a copy of the subrogation receipt I executed on behalf of Asmo NC in consideration for the \$422,129.33 insurance claim payment by Mitsui.

14. The documents included in Exhibits 1 through 5 of this declaration were maintained by Asmo NC in the regular and ordinary course of business.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on December 21, 2007 at Statesville, North Carolina



David Clifton